

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF a hearing under Part 3 of the *Real Estate Act*, R.S.A. 2000, c. R-5, regarding the conduct of **Melenda Arlene Simmons**, a Real Estate Associate, currently registered with Elite Ownership Group Ltd operating as Re/Max Elite

Hearing Panel Members: [G.F], Chairperson
[M.C], Panel Member (Licensee)
[S.D] (Panel Member (Licensee)
Counsel for the Panel:
Mr. Anthony Dekens, Bishop & McKenzie LLP

Application Date: December 3, 2021

Hearing Cases: 004972 and 008729

Appearing: Ms. Sania Chaudhry, Counsel for the Registrar
No appearance by Melenda Arlene Simmons

Amended Decision of the Hearing Panel

ISSUES:

The issues before this Hearing Panel convened on December 3, 2021, are:

1. Shall the Hearing Panel accept the Licensee's Admission of Conduct Deserving of Sanction in case 004972 and 008729? YES.
2. Does the Hearing Panel accept the Joint Submission on Sanction in case 004972 and 008729? YES

BACKGROUND AND FACTS CONSIDERED:

On November 12, 2021 the Registrar issued a Notice of Hearing for each of cases 004972 and 008729. The hearing of the two cases was set for December 3, 2021. (Exhibit 1)

On October 26, 2021, Simmons provided her signed Admission of Conduct Deserving of Sanction and her acknowledgement of having been given the opportunity to obtain legal advice, before signing the Admission for Case 004972 (Exhibit 2) and Case 008729 (Exhibit 3).

On December 2, 2021, the Real Estate Council of Alberta issued a letter indicating the Board of Directors passed a motion at its November 10, 2021 meeting accepting the statements of admission of conduct deserving of sanction provided by Melenda Arlene Simmons in accordance with section 46 of the Real Estate Act regarding case 004972 and case 008729; and referring each matter to this hearing panel. (Exhibit 4).

On October 28, 2021, Simmons provided by email addressed to Sania Chaudhry, counsel for RECA, her signed Joint Submission on Sanction for case 004972 (Schedule "1") and case 008729 (Schedule "2"). (Exhibit 5)

The Real Estate Council of Alberta and Simmons entered into a Joint Submission on Sanction in case 004972. The Joint Submission on Sanction proposed a monetary fine of \$8,500 for case 004972. (Exhibit 5)

The Real Estate Council of Alberta and Simmons entered into a Joint Submission on Sanction in case 008729. The Joint Submission on Sanction proposed a monetary fine of \$6,000 for case 008729. (Exhibit 5)

On November 16, 2021, Simmons was served with notice of the hearing for cases 004972 and 008729, as set out in the Statutory Declaration of [A.M]. (Exhibit 6).

On December 1, 2021, Simmons sent an email to the Hearing Administrator confirming her signature on previously submitted documents, and that she will not attend the December 3, 2021 hearing. (Exhibit 7).

ANALYSIS & REASONS:

The hearing panel's analysis and reasons are that:

The Licensee's Admission of Conduct Deserving of Sanction in case 004972 (Schedule "3") and case 008729 (Schedule "4") are deemed to be, pursuant to the *Real Estate Act*, s.47, a finding of this panel. The substance and the notice provided to Simmons is material to this Panel's decision on whether Simmons has had fair opportunity to respond to the complaints made against her.

This panel has authority to impose a sanction upon the Licensee whose conduct has been found deserving of sanction pursuant to the *Real Estate Amendment Act*, s.43.

The Joint Submission on Sanctions in each case set out factors that this hearing panel considered in assessing sanction. Those factors included an analysis of:

- a) the nature and gravity of the proven allegations;

- b) the Licensee's age and experience; being 50 years of age and having experience as a real estate associate since 2010;
- c) the previous character of the Licensee. It was noted by the Panel that the Licensee had been subject to prior complaints, being a December 2014 Administrative Penalty for breach of Rules 41(e) and 42(a) plus a September 2016 Letter of Reprimand for breach of Rule 42(a); and an April 2019 Letter of Reprimand for breach of Rule 40(1)(c);
- d) the number of times the offence was proven. The Licensee in her Joint Submission admitted to a breach of Rules 41(a), 41(d), and 55(1) plus four breaches of Rule 41(b);
- e) the role of the licensee in acknowledging what occurred. The Panel notes the Licensee's acceptance of full responsibility for her actions, and her remorse;
- f) The impact of the incident on the victim. The Panel notes the \$10,000 lost deposit suffered by [M.A]; and the expense and inconvenience to which [M.A] is put to prove damages in a civil action;
- g) Mitigating circumstances. The Licensee's co-operation in agreeing to admissions deserving of sanction and the cost saving of time in conducting a hearing; plus the saving of time, expense and reduction of stress in requiring [M.A] to appear as a witness at the hearing was taken into consideration;
- h) Aggravating circumstances. The Licensee in her Joint Submission admits her conduct is egregious and requires a significant sanction;
- i) The need to promote specific and general deterrence and protect the public. The Panel was of the opinion that the proposed sanctions will impress upon the profession and the public the importance the Real Estate Council places upon a Licensee's duty to practice in strict compliance with the *Real Estate Act* and the Rules; and to deliver services in a competent manner;
- j) The need to maintain the public's confidence. See i) above plus note that the public expects a Licensee to adhere to their fiduciary duty in delivering services to clients. The Licensee failed to uphold the public's trust in the real estate professionals;
- k) The degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct; and
- l) The range of sanctions imposed in other similar cases. The Joint Submission of the parties regarding sanctions imposed by similar cases in which there were breaches of multiple rules, was reviewed and considered by the Panel.

DECISION:

It was the unanimous decision of the Hearing Panel that the joint submission of sanction in each case, is reasonable and within the appropriate and acceptable range. This case presents no factor that warrants deviation from the sanction jointly agreed.

Pursuant to s.43(1)(d), of the *Real Estate Act*, the Licensee shall pay to the Council monetary fines totaling \$14,500.00; being the combined total of \$8,500.00 in fines and sanction for breaches of *Real Estate Act* Rule 42(a) (\$1,500), Rule 41(b) (\$2,000), Rule 41(d) \$2,500, Rule 41(f) (\$1,500) and Rule 43(1) (\$1,000), case 004972; and \$6,000.00 in fines and sanctions for breaches of *Real Estate Act* Rule 41(b) (\$2,500), Rule 58(k) (\$2,000) and Rule 55(1) (\$1,500), case 008729.

In addition, and as jointly submitted and agreed by the parties for Case 008729, pursuant to the *Real Estate Act* s.43(1)(c) and s.43(1)(d.1), the Licensee shall:

- a) within 3 months of the date of this decision, successfully complete Education Upgrade Course Commercial Real Estate 2020 (EDU-001413), as a condition of eligibility to renew her license in Commercial Real Estate; and
- b) within 12 months of the date of this decision, successfully complete Education Upgrade Courses of Consumer Relationships (EDU-001341), Contract Law (EDU-001346), Ethics, Professionalism and Risk Reduction (EDU-001345), and *Real Estate Act*, Rules and Regulations (EDU-001344).

This decision was made on January 11, 2021.

"Signature"

[G.F] Hearing Chair

Schedule "1"

THE REAL ESTATE COUNCIL OF ALBERTA

Case: 004972
Process: A Hearing under Part 3 of the *Real Estate Act*
Licensee : Melenda Arlene Simmons
Class of License: Real Estate Associate
Current brokerage: Currently registered with Elite Ownership Group Ltd. o/a
Re/Max Elite
Document: JOINT SUBMISSION ON SANCTION

Introduction

1. The Licensee made an Admission of Conduct Deserving of Sanction under section 46 of the *Real Estate Act*.
2. The Admission was accepted by the Board and has been entered as an exhibit in this hearing.
3. Under s.47 of the Real Estate Act the Admission is deemed to be a finding of this Panel and concludes Phase 1 of the hearing.
4. Phase 2 of the hearing concerns sanction.
5. The Registrar and Licensee propose the following sanction:

a) Monetary Fines:

Breach	Fine
Rule 42(a) of the <i>Real Estate Act Rules</i>	\$1,500
Rule 41(b) of the <i>Real Estate Act Rules</i>	\$2,000
Rule 41(d) of the <i>Real Estate Act Rules</i>	\$2,500
Rule 41(f) of the <i>Real Estate Act Rules</i>	\$1,500
Rule 43(1) of the <i>Real Estate Act Rules</i>	\$1,000
TOTAL	\$8,500

Panel Authority on Sanction

6. The Hearing Panel's authority to impose sanction on a licensee whose conduct has been found deserving of sanction is described at section 43 of the *Real Estate Amendment Act*:

Decision of Hearing Panel

43(1) If a Hearing Panel finds that the conduct of a licensee was conduct deserving of sanction, the Hearing Panel may make any one or more of the following orders:

- (a) an order cancelling or suspending any license issued to the licensee by an Industry Council;*
- (b) an order reprimanding the licensee;*
- (c) an order imposing any conditions or restrictions on the licensee and on that licensee's carrying on of the business of a licensee that the Hearing Panel, in its discretion, determines appropriate;*
- (d) an order requiring the licensee to pay to the Council a fine, not exceeding \$25,000, for each finding of conduct deserving of sanction;*
- (d.1) an order prohibiting the licensee from applying for a new license for a specified period of time or until one or more conditions are fulfilled by the licensee;*
- (e) any other order agreed to by the parties.*

Factors on Sanction

7. A RECA Panel must consider whether a number of factors are relevant when assessing sanction. *Jaswal v Newfoundland (Medical Board)*[**TAB 1**], lists a number of factors that may be relevant:

- a) the **nature and gravity** of the proven allegations
- b) the **age and experience** of the licensee
- c) the **previous character** of the offender and, in particular, the presence or absence of prior complaints or convictions
- d) the **number of times the offence was proven** to have occurred;
- e) the **role of the licensee** in acknowledging what occurred
- f) whether the licensee had already suffered serious financial or **other penalties** as a result of the allegations having been made
- g) **impact of the incident on the victim**, if any
- h) **mitigating** circumstances
- i) **aggravating** circumstances

- j) the need to promote **specific and general deterrence** and thereby protect the public and ensure the safe and proper conduct of the profession
 - k) the **need to maintain the public's confidence** in the integrity of the profession
 - l) the **degree** to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct and
 - m) the **range of sentence in other similar cases**.
8. *General deterrence* refers to the effect a sanction issued in one case will have dissuading others to become involved in the same conduct.
9. *Specific deterrence* refers to the effect a sanction has to correct the conduct of the person who is sanctioned. Specific deterrence can also be achieved by punishment and by corrective or education conditions.
10. *Mitigating* and *aggravating* factors refer to evidence which make the conduct less serious (mitigating) or more serious (aggravating). While all of the above factors can be thought of as mitigating or aggravating, items (h) and (i) refer to factors not specifically enumerated in *Jaswal*.
11. The Hearing Panel must consider each relevant factor, give weight to the factor in terms of how it should influence the sanction, consider the mandate of RECA under the *Real Estate Act* and then make an order which complies with section 43.

Analysis of the *Jaswal* Factors

12. Age and Experience of the Licensee

- a) Ms. Simmons is currently 50 years old.
- b) She has been licensed as a real estate associate since 2010.
- c) Given her lengthy experience, she should have been aware that her conduct in this matter demonstrated a lack of competence and failed her fiduciary duty to Ames and Schock.

13. The Previous Character of the Member

- a) Ms. Simmons has prior discipline:
 - Administrative Penalty in December 2014 for breach of Rules 41(e) and 42(a) by misrepresenting a Consumer Relationship Guide to her broker and RECA and failing to make her role understood to her clients;
 - Letter of Reprimand in September 2016 for breach of Rule 42(a) by misrepresenting the registered size of a condominium;
 - Letter of Reprimand in April 2019 when she failed to notify RECA when a judgment was rendered against her, thereby breaching Rule 40(1)(c); and

- b) An advisory note is not discipline but is information for the licensee about their practice. Ms. Simmons was issued an advisory note in July 2012 about Rule 41(b) where she did not explain the ramifications of waiving financing conditions when she had the clients sign their purchase agreement.

14. The Number of Times the Offence was Proven to have Occurred.

- a) Ms. Simmons breached several of the *Real Estate Act Rules*, including one breach each of Rules 42(a), 41(d), and 55(1). She also breached Rule 41(b) four times as follows:
 - o Not getting instructions from Ames and Schock on who they wanted the buyer to be;
 - o Having the addendum signed after the initial purchase contract's condition date had already expired and then having the following amendment signed by only Ames after Schock had already replaced her as buyer;
 - o Advising Ames and Schock about capital gains tax when she is not qualified to do so; and
 - o Not advising Ames and Schock that the financing condition had not been met in time and, instead, telling them they needed to switch the buyer on the purchase contract to avoid capital gains tax.

15. The Nature and Gravity of the Proven Allegations

- a) Ms. Simmons's conduct is egregious and requires a significant sanction. Ms. Simmons misrepresented to Ames that the Property had multiple offers when it did not. She also failed to draft the purchase contract and various addendums with care, and provided advice about capital gains tax when she was not qualified to do so.
- b) Ames lost her \$10,000 deposit because of Ms. Simmons' actions.
- c) A real estate professional needs to be diligent in carrying out the various functions of their position and to fulfill their fiduciary duty to their clients. When this does not occur it erodes the trust and confidence placed in the profession by the various stakeholders.
- d) As such, Ms. Simmons's conduct negatively effects trust with clients, which is at the core of the real estate profession. Her conduct is serious in both nature and gravity as it goes to the profession's credibility and competence.

16. The Need to Maintain Public Confidence in the Profession

- a) Real estate associates must practice in strict compliance with the Act and the Real Estate Act Rules (the "Rules"), in order to maintain the integrity of the profession. Public confidence in the profession is compromised when an associate refuses to follow the legislation or guidelines and fail to demonstrate competence.
- b) Not only did Ms. Simmons provide incompetent service, she also failed her fiduciary duties to her clients. Ms. Simmons's conduct undermines the trust the public puts in real estate professionals when they enter into real estate transactions.
- c) The education and the fines proposed herein are sufficient to maintain public confidence in the Alberta Real Estate profession.

17. The Role of the Member in Acknowledging What Occurred

- a) Ms. Simmons has now taken full responsibility for her actions and shown remorse for what occurred.

18. The Impact of the Incident on the Victims

- a) The complainant, Ames, lost her \$10,000 deposit when Schock replaced her as buyer in the purchase, due to Ms. Simmons not obtaining her consent to have the deposit applied to Schock's purchase. Also, the complainants bought the Property in a sense of urgency without viewing, due to Ms. Simmons' misrepresentations.

19. Specific and General Deterrence

- a) There is a significant need for general deterrence, especially in serious situations where a licensee's lack of competence leads to financial loss. Licensees must recognize that harm to public confidence of the Alberta real estate profession comes with sanctions.
- b) Ms. Simmons has a prior discipline history which necessitates specific deterrence. But, the fact that she has now accepted responsibility for her actions reduces the necessity of specific deterrence.

20. Mitigating Circumstances

- a) Ms. Simmons agreed to an admission deserving of conduct and the herein submissions on sanction, saving the time and cost of proceeding to a hearing.

Previous Sanctions in Similar Circumstances (Precedents)

21. Precedents are not binding on the Hearing Panel but can help the Panel impose sanctions consistently to comparable conduct.
22. We first list some precedents for similar cases with multiple breaches to demonstrate the range for total fines in such cases and then list some precedents for breaches of Rule 41(a), 41(b), 41(d), and 43(1), respectively, to indicate the fines for these specific breaches. These precedents are instructive in determining the range of fines that should be levied in Ms. Simmons's case.

a) Similar Cases with Breaches of Multiple Rules

23. These precedents indicate a range of fines from \$5,500 to \$17,500 in cases where multiple breaches of similar rules exist.
24. Though there were multiple breaches, Ms. Simmons' has disciplinary history for previous similar conduct, and the complainants faced financial loss, Ms. Simmons has now accepted responsibility for her actions and has expressed remorse. As such, it is proposed that a total fine of \$8,500 be issued in Ms. Simmons' case – near the lower range of fines.
25. In *Marsh* [TAB 2], a real associate was found to have breached Rules 41(b) and 41(d) like Ms. Simmons, in addition to Rules 41(a), 42(b) and 53(c). Ms. Marsh was suspended for 3 months and fined a total of \$17,500. Specifically, Ms. Marsh was fined \$5,000 for her breach of Rule 41(a), \$7,000 for her breach of Rule 41(b) and \$1,500 for her breach of Rule 41(d), in addition to \$2,500 for Rule 42(b) and \$1,500 for Rule 53(c). Ms. Marsh breached her fiduciary obligation to her clients by advising them that they could waive the property inspection condition despite knowing that she had hired an unlicensed property inspector. She also did not properly draft an amendment to extend the financing condition.
26. Ms. Simmons' conduct is similar to Ms. Marsh's, as she too has engaged in multiple breaches of the Rules while failing to fulfil her fiduciary obligations and not properly drafting the purchase contract's amendments. Ms. Simmons, however, has expressed genuine remorse and engaged in a fewer breaches.
27. In *Nimmo* [TAB 3], a real estate associate breached Rules 42(a) and 41(d) like Ms. Simmons, in addition to Rules 41(e), 41(a), and 57(a). He was fined \$10,138.25. Mr. Nimmo failed to disclose a higher offer to the seller, failed to ensure his role was understood by all parties in the transaction, and advised that an offer had not been accepted because of the possession date which was not true. Like Mr. Nimmo, Ms. Simmons misinformed her client

that the Property had multiple offers and was not yet on MLS, inducing her to put an offer on the Property without viewing it.

28. In *Shah* [TAB 4], a real estate associate was fined \$2,000 for the breach of Rule 41(b), \$1,500 for Rule 62(1)(a), \$1,500 for Rule 54(3), \$1,500 for 53(c), and \$8,500 for Rule 42(g), for a total of \$15,000 in fines. Mr. Shah, similar to Ms. Simmons, failed to competently complete a Waiver of Conditions and to specify the terms of trust for a deposit on a purchase contract. Unlike Ms. Simmons, Mr. Shah engaged in even more egregious breaches including undermining public confidence including pressuring the complainant to co-sign for a stranger.
29. In *Glavonjic* [TAB 5], a real estate associate was fined \$2,000 for a breach of Rule 41(b), \$1,500 for Rule 59, and \$2,000 for Rule 42(a), for a total of \$5,500 in fines. Like Ms. Simmons, Ms. Glavonjic drafted the Purchase Contract conditions in an unclear and ineffective manner.
30. In *Kainth* [TAB 6], a real estate associate was fined \$4,500 for a breach of Rule 41(d) and \$1,500 for a breach of Rule 53(a) for a total of \$6,000 in fines. Mr. Kainth failed to fulfill his fiduciary obligations to his client by waiving financing conditions when he knew the client did not have mortgage approval yet. Eventually, the seller terminated the agreement and the client lost his \$5,000 deposit. Similarly, Ms. Simmons knew the financing condition had not been met in time when she had the clients sign the addendum and amendment, but did not inform her clients of this. Moreover, Ms. Simmons' instructed Selinger to use Ames' \$10,000 deposit in Schock's purchase without her consent and Ames lost that \$10,000. However, unlike Mr. Kainth, Ms. Simmons accepted her wrongdoing and expressed remorse.
31. In *Holbrook* [TAB 7], a real estate associate breached Rules 42(a), 55(1), and 54(3). He was fined \$3,000 for his breach of Rule 55(1) and \$3,000 for Rule 54(3), and issued a letter of reprimand for his breach of Rule 42(a) – for a total of \$6,000 in fines. Like Ms. Simmons, he did not disclose in writing the nature of the services he was providing to his client immediately upon receiving their confidential information.
32. These precedents indicate a range of fines from \$5,500 to \$17,500 in cases where multiple breaches of similar rules exist. Though Ms. Simmons has been sanctioned for similar conduct before, she breached Rule 41(b) itself four times, and Ames lost her \$10,000 deposit as a result of Ms. Simmons' conduct, Ms. Simmons has now accepted responsibility for her conduct and expressed genuine remorse.. This justifies the total agreed upon fine of \$8,500.
33. The facts in Ms. Simmons' case are most similar to *Marsh*, *Nimmo*, and *Shah*. Like *Marsh* and *Nimmo*, Ms. Simmons did not share that the financing condition had not been met when she was having Ames and Schock sign the addendum and amendment. She also misinformed Ames about the presence of multiple offers, thereby breaching her fiduciary duties. Like *Shah*, she failed to competently draft purchase documents. However, Ms. Simmons' case is less aggravating because, unlike those licensees, she has accepted full responsibility for her conduct and has also expressed remorse.

34. Though the facts are also similar in *Glavonjic*, *Kainth*, and *Holbrook* in terms of Ms. Simmons' lack of care in drafting the purchase documents, Ms. Simmons' case is more egregious in nature. She has been sanctioned for similar conduct before. Her client suffered financial loss because of her conduct. Also, Ms. Simmons engaged in more breaches – four breaches of competence, one breach of fiduciary duty, one breach of making misleading representations that are reckless or intentional, and lastly a breach of the duty to disclose the nature of services being provided upon receiving confidential information. This justifies the total agreed upon fine of \$8,500.
35. As such, the total \$8,500 (at the lower end of fines) is a balanced and appropriate sanction for Ms. Simmons' breaches.

b) Breach of Rule 42(a)

36. The precedents indicate a range of \$1,500 to \$5,000 in fines for a single breach of Rule 42(a).
37. In Ms. Simmons' case, though the precedents indicate she should be fined greater for this breach (\$2,000 based on the most similar precedent), we propose a fine of \$1,500 to keep the total amount of fines reasonable.
38. In *Nimmo* [TAB 3], a real estate associate was fined \$2,500 for breaching Rule 42(a). Mr. Nimmo failed to disclose a higher offer to the seller and advised that an offer had not been accepted because of the possession date which was not true. Like Mr. Nimmo, Ms. Simmons misinformed her client that the Property had multiple offers and was not yet on MLS, inducing her to put an offer on the Property without viewing it.
39. In *Glavonjic* [TAB 5], a real estate associate was fined \$2,000 for a breach of Rule 42(a). Ms. Glavonjic's conduct was less aggravating than that of Ms. Simmons as Ms. Glavonjic had no disciplinary history.
40. In *MacLean* [TAB 8], Mr. Maclean was fined \$5,000 for one breach of Rule 42(a). Like Ms. Simmons, Mr. MacLean made representations and carried on conduct that was reckless. In his case, he did this by adding information to the agreement after it was signed and submitting an altered agreement to the brokerage.
41. In *Melville* [TAB 9], a licensee was fined \$5,000 for breaching Rule 42(a). Mr. Melville represented the sellers in the sale of their property. While one of the sellers was out of town, he forged his signature on an amendment in order to expedite the process. When RECA opened a file and Mr. Melville misrepresented to RECA that he did not forge the buyer's signature. He had been a real estate associate for over 10 years and was a broker delegate at the time of the conduct. However, his forgeries were done as an act of expedience and not done to intentionally go against the buyer's wishes. Although Ms. Simmons did not forge her clients' signatures, she made misleading statements.
42. In *Nimji* [TAB 10], a licensee was fined \$1,500 for breaching Rule 42(a). Mr. Nimji, while representing the seller, stated to the buyer's real estate associate that there were multiple

offers on the property when there actually was not. Ms. Simmons conduct is more severe because she made this misrepresentation to her own clients.

43. The precedents indicate a range of \$1,500 to \$5,000 in fines for a single breach of Rule 42(a).
44. Ms. Simmons' situation is closest to *Nimmo* and *Glavonjic* where the licensees made intentional or reckless misleading statements to their clients, like Ms. Simmons did to Ames. Her situation is more aggravating than *Nimji* because she made these statements to her own client and these statements induced her client to place an offer on the property without viewing it.
45. Ms. Simmons' conduct is less severe than *Maclean* and *Melville*. She did not engage in actual forgery, nor did she alter any agreements.
46. Therefore, Ms. Simmons should be fined \$2,000 for this breach. However, the parties have agreed to a lower fine of \$1,500 to keep the total amount of fines owed reasonable.

c) Breach of Rule 41(b)

47. The precedents indicate a range of fines from \$1,000 to \$3,000 for breaching Rule 41(b).
48. We propose a global fine of \$2,000 for all four breaches of Rule 41(b) to be reasonable and to recognize the fact that Ms. Simmons has taken full responsibility for her conduct and expressed genuine remorse.
49. In *Crisostomo* [TAB 11], the licensee agreed to a joint submission of sanction of \$1,000 for his breach of Rule 41(b). Mr. Crisostomo made errors on mortgage applications to various lenders. Unlike Mr. Crisostomo, Ms. Simmons had already been sanctioned previously for breach of competence.
50. In *Faria* [TAB 12], the Appeal Panel confirmed an Administrative Penalty of \$1,500 for breaching Rule 41(b). Mr. Faria inserted a clause into a purchase contract that exposed his client to a risk of losing a landscaping deposit. Mr. Faria also failed to adequately explain to his client the options available to him in placing the deposit into trust. The client ultimately lost a \$2,500 deposit. Like Mr. Faria, Ms. Simmons did not explain to her clients the options available when Ames failed to meet the financing condition. Instead, she drafted an addendum and an amendment to change the buyer and financing condition deadline after the agreement had already been nullified without telling her clients that the financing condition had expired.
51. In *Mele* [TAB 13], Mr. Mele received a fine of \$5,000 for breaching Rule 41(b). Mr. Mele inadequately filled out paperwork and had the client sign a notice waiving conditions when it was inappropriate to do so. Mr. Mele did not acknowledge any wrongdoing. In contrast, Ms. Simmons has taken full responsibility for her actions and has expressed her remorse.

52. In *Hartell* [TAB 14], a real estate associate was fined \$3,000 for breaching Rule 41(b). Ms. Hartell was unaware whether inspections had been completed and whether permits had been issued when her clients accepted an offer to purchase the property. She failed to advise her clients about these issues. Ms. Simmons similarly did not advise her clients that they had failed to meet the financing condition date when they signed the addendum and amendment to the purchase contract. However, she admitted responsibility.
53. The precedents indicate a range of fines from \$1,000 to \$3,000 for breaching Rule 41(b).
54. The conduct in *Cristostomo* and *Faria* is similar to Ms. Simmons, but in those cases, there was little to no financial harm. Ms. Simmons' conduct is more close to the conduct in *Mele* and *Hartell* as Ms. Simmons had her clients complete an addendum when it was inappropriate to do so, did not inform them that they had not met the financing condition at the time of signing the addendum, and had drafted an addendum and amendment that were of no force. However, she did rectify the situation – without telling her clients that there was any mistake – by having Schock sign an entirely new purchase contract. Moreover, she has the additional mitigating factor of now accepting full responsibility for her actions and expressing remorse.
55. These precedents also show that Ms. Simmons should be levied a fine of \$2,000 for this Rule.

d) Breach of Rule 41(d)

56. The precedents indicate a range of fines from \$1,500 to \$5,000 for breaching Rule 41(d) in similar cases.
57. Ms. Simmons has now expressed responsibility and remorse for her actions. Due to this, we propose a fine of \$2,500 for breaching Rule 41(d), at the lower end.
58. As noted above in *Kainth* [TAB 6], a real estate associate was fined \$4,500 for a breach of Rule 41(d) when he allowed a client to waive his financing condition when he knew the client had not been approved yet for financing. Similarly, Ms. Simmons did not tell Ames and Schock that Ames had not met the financing condition when she was switching the buyer from Ames to Schock. However, she has now accepted her wrongdoing.
59. In *Stenzel* [TAB 15], a real estate associate was levied a \$1,500 Administrative Penalty for breaching Rule 41(d). She led her client to believe that mortgage financing had been approved when it had only been conditionally approved and the buyer waived the financing condition. Ms. Simmons did not tell her clients that their financing had not been approved when signing the addendum, meaning that the financing condition had not been met. More egregiously, Ms. Simmons also misinformed her clients about the property having multiple offers and had Ames' deposit switched to Schock without her permission.
60. In *Keatley* [TAB 16], a real estate associate breached Rule 41(d) and was issued an Administrative Penalty of \$5,000. Ms. Keatley arbitrarily rejected a request for an extension from the buyers regarding the financing condition without consulting her seller clients.

Like Ms. Keatley, Ms. Simmons put Ames as the initial buyer without asking her clients and then switched the buyer to Schock without informing her clients that she was doing this because they had not met the financing condition. However, unlike Ms. Keatley, Ms. Simmons' actions did not lead to the collapse of the transaction. Moreover, she has now accepted responsibility for her conduct.

61. In *McLean* [TAB 17], a real estate associate was levied a \$5,000 Administrative Penalty for breaching Rule 41(d). Mr. McLean failed to amend trust terms for a deposit from his buyer clients. He assured his seller clients that he was obtaining the deposit cheque when in fact he was having difficulties doing so. Ms. Simmons similarly failed to advise her clients that financing had fallen through, but, unlike Mr. McLean's case, the transaction did not fall through.
62. The precedents indicate a range of fines from \$1,500 to \$5,000 for breaching Rule 41(d).
63. The conduct in *Stenzel* was less severe. In addition to not informing her clients that the financing condition had not met, Ms. Simmons had misinformed and pressured her clients into putting in an offer on the property without viewing it. She also he never obtained instructions from her clients on who the buyer would be and whether the initial deposit could have been transferred from Ames to Schock. This additional conduct brings Ms. Simmons' case closer to *McLean* and *Keatley*. However, unlike those cases, Ms. Simmons' actions did not lead to the transaction falling through and the transaction still completed. Also, unlike those cases, she has now accepted her wrongdoing.
64. As such, a fine of \$2,500 is proposed for this Rule.

e) Breach of Rule 41(f)

65. The precedents indicate a range of fines from \$1,500 to \$3,500 for each breach of Rule 41(f) in similar cases. Though she should be fined higher, it is proposed that Ms. Simmons be fined \$1,500 for breaching this rule to keep the overall fines reasonable.
66. In *Yip* [TAB 18], a real estate associate was fined \$1,500 for breaching Rule 41(f). Mr. Yip entered into a dual agency relationship for both the buyer and seller, but he did not disclose to the seller that he had a pre-existing personal relationship with the buyer. Similarly, Ms. Simmons did not disclose that she was in a conflict of interest when representing both Ames and Schock. Ms. Simmons case is more aggravating because she engaged other Rules as well, unlike Mr. Yip and she applied Ames' deposit towards Schock's sole purchase of the property.
67. In *Liu* [TAB 19], a real estate associate broker was fined \$3,500 for breaching Rule 41(f). He presented an offer to purchase the property of a seller client of the brokerage. He did not disclose the conflict of interest that inherently existed in his offer while representing the seller. He also breached the requirement to provide all documents to the brokerage. Similarly, Ms. Simmons did not explain the inherent conflict of interest in regards to

representing Ames and Schock in applying Ames' deposit without her consent to Schock's sole purchase. She also breached more than one Rule.

68. In *Oliverio* [TAB 20], a mortgage broker was fined \$1,500 for breaching Rule 41(f). He failed to disclose in writing the conflict of interest in lending his clients the requested funds from his own company. Unlike Ms. Simmons, Mr. Oliverio's clients were aware that his company was providing the funds. In Ms. Simmons' case, Ames did not consent to have her deposit being applied to Schock's sole purchase of the home.
69. The precedents indicate a range of fines from \$1,500 to \$3,500 for breaching Rule 41(f).
70. The conduct in *Yip* and *Oliverio* was less severe. In addition to not explaining the conflict of interest to her clients, Ms. Simmons did not obtain Ames' consent before applying her deposit to Schock's sole purchase of the property. Ms. Simmons also engaged in breaches of multiple Rules within the same transaction. This brings Ms. Simmons' case closer to *Liu*.
71. As such, despite a higher fine being warranted, a fine of \$1,500 is proposed for this Rule.

f) Breach of Rule 43(1)

72. The prescribed fine for a breach of Rule 43(1) is \$1,000 pursuant to the *Real Estate Act Bylaws*. As a result, Ms. Simmons should be fined \$1,000 for her breach of this Rule.

Sanction

73. Based on precedent and the other *Jaswal* factors it is agreed that an appropriate fines for the breaches are as follows:

Breach	Fine
Rule 42(a) of the <i>Real Estate Act Rules</i>	\$1,500
Rule 41(b) of the <i>Real Estate Act Rules</i>	\$2,000
Rule 41(d) of the <i>Real Estate Act Rules</i>	\$2,500
Rule 41(f) of the <i>Real Estate Act Rules</i>	\$1,500
Rule 43(1) of the <i>Real Estate Act Rules</i>	\$1,000
TOTAL	\$8,500

The Agreement between the Registrar and Licensee

74. An additional factor is that the parties have reached an agreement on conduct and on sanction taking into account the relevant factors.
75. The Supreme Court of Canada addressed the “public interest” test that should be used when considering whether to depart from an agreed outcome in the case *R v. Anthony-Cook* (2016) [TAB 21]:

32 Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.

33 In Druken, at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so “markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system”. And, as stated by the same court in R. v. O. (B.J.), 2010 NLCA 19 (N.L. C.A.) (CanLII), at para. 56, when assessing a joint submission, trial judges should “avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts”.

76. The Court in *Anthony-Cook* also outlines the procedure decision makers must follow if they are inclined to depart from a joint submission (Para 49 – 60).
77. The Registrar and Licensee have considered the factors for an appropriate sanction and submit that this sanction is within an appropriate range that the Panel can accept.
78. Please feel free to express your concerns about the sanction or to ask for further submissions or more information from either party.

All of which is respectfully submitted this 28 day of October, 2021.

Sincerely,

Sania Chaudhry, Counsel for the Registrar

Melenda Arlene Simmons

Schedule "2"

THE REAL ESTATE COUNCIL OF ALBERTA

Case: 008729
Process: A Hearing under Part 3 of the *Real Estate Act*
Licensee : Melenda Arlene Simmons
Class of License: Real Estate Associate
Current brokerage: Currently registered with Elite Ownership Group Ltd. o/a
Re/Max Elite
Document: JOINT SUBMISSION ON SANCTION

Introduction

1. The Licensee made an Admission of Conduct Deserving of Sanction under section 46 of the *Real Estate Act*.
2. The Admission was accepted by the Board and has been entered as an exhibit in this hearing.
3. Under s.47 of the *Real Estate Act* the Admission is deemed to be a finding of this Panel and concludes Phase 1 of the hearing.
4. Phase 2 of the hearing concerns sanction.
5. The Registrar and Licensee propose the following sanction:

a) Monetary Fines:

Breach	Fine
Rule 41(b) of the <i>Real Estate Act Rules</i>	\$2,500
Rule 58(k) of the <i>Real Estate Act Rules</i>	\$2,000
Rule 55(1) of the <i>Real Estate Act Rules</i>	\$1,500
TOTAL	\$6,000

b) Education:

Successfully complete Education Upgrade Courses of Consumer Relationships (EDU-001341), Contract Law (EDU-001346), Ethics, Professionalism and Risk

Reduction (EDU-001345), and *Real Estate Act*, Rules and Regulations (EDU-001344) within 12 months of the Hearing Panel's decision.

The Licensee will decide to either not renew her license in Commercial Real Estate or to take Practice of Commercial Real Estate 2020 (EDU-001413) within 3 months of the Hearing Panel's decision.

Panel Authority on Sanction

6. The Hearing Panel's authority to impose sanction on a licensee whose conduct has been found deserving of sanction is described at section 43 of the *Real Estate Amendment Act*:

Decision of Hearing Panel

43(1) If a Hearing Panel finds that the conduct of a licensee was conduct deserving of sanction, the Hearing Panel may make any one or more of the following orders:

- (a) an order cancelling or suspending any license issued to the licensee by an Industry Council;*
- (b) an order reprimanding the licensee;*
- (c) an order imposing any conditions or restrictions on the licensee and on that licensee's carrying on of the business of a licensee that the Hearing Panel, in its discretion, determines appropriate;*
- (d) an order requiring the licensee to pay to the Council a fine, not exceeding \$25,000, for each finding of conduct deserving of sanction;*
- (d.1) an order prohibiting the licensee from applying for a new license for a specified period of time or until one or more conditions are fulfilled by the licensee;*
- (e) any other order agreed to by the parties.*

Factors on Sanction

7. A RECA Panel must consider whether a number of factors are relevant when assessing sanction. *Jaswal v Newfoundland (Medical Board)* [TAB 1], lists a number of factors that may be relevant:

- a) the **nature and gravity** of the proven allegations
 - b) the **age and experience** of the licensee
 - c) the **previous character** of the offender and, in particular, the presence or absence of prior complaints or convictions
 - d) the **number of times the offence was proven** to have occurred;
 - e) the **role of the licensee** in acknowledging what occurred
 - f) whether the licensee had already suffered serious financial or **other penalties** as a result of the allegations having been made
 - g) **impact of the incident on the victim**, if any
 - h) **mitigating** circumstances
 - i) **aggravating** circumstances
 - j) the need to promote **specific and general deterrence** and thereby protect the public and ensure the safe and proper conduct of the profession
 - k) the **need to maintain the public's confidence** in the integrity of the profession
 - l) the **degree** to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct and
 - m) the **range of sentence in other similar cases**.
8. *General deterrence* refers to the effect a sanction issued in one case will have dissuading others to become involved in the same conduct.
9. *Specific deterrence* refers to the effect a sanction has to correct the conduct of the person who is sanctioned. Specific deterrence can also be achieved by punishment and by corrective or education conditions.
10. *Mitigating and aggravating* factors refer to evidence which make the conduct less serious (mitigating) or more serious (aggravating). While all of the above factors can be thought of as mitigating or aggravating, items (h) and (i) refer to factors not specifically enumerated in *Jaswal*.
11. The Hearing Panel must consider each relevant factor, give weight to the factor in terms of how it should influence the sanction, consider the mandate of RECA under the *Real Estate Act* and then make an order which complies with section 43.

Analysis of the *Jaswal* Factors

12. Age and Experience of the Licensee

- a) Ms. Simmons is currently 50 years old.
- b) She has been licensed as a real estate associate since 2010.
- c) Given her lengthy experience, she should have been aware that her conduct in this matter demonstrated a lack of competence.

13. The Previous Character of the Member

- a) Ms. Simmons has prior discipline:
 - Administrative Penalty in December 2014 for breach of Rules 41(e) and 42(a) by misrepresenting a Consumer Relationship Guide to her broker and RECA and failing to make her role understood to her clients;
 - Letter of Reprimand in September 2016 for breach of Rule 42(a) by misrepresenting the registered size of a condominium; and
 - Ms. Simmons was issued a Letter of Reprimand in April 2019 when she failed to notify RECA when a judgment was rendered against her, thereby breaching Rule 40(1)(c); and
- b) An advisory note is not discipline but is information for the licensee about their practice. Ms. Simmons was issued an advisory note in July 2012 about Rule 41(b) where she did not explain the ramifications of waiving financing conditions when she had the clients sign their purchase agreement.

14. Number of Times the Offence was Proven to have Occurred.

- a) Ms. Simmons breached multiple of the *Real Estate Act Rules*. There was one breach of each Rule 58(k) and Rule 55(1). She breached Rule 41(b) five times as follows:
 - Not advising her client to have a formal property inspection;
 - Not explaining all terms of the lease to her client, including the change to the permit condition and the removal of the renewal clause;
 - Not accounting for the expiry of the development permit notification period, approval of the building permit, and approval of the business license when drafting the waiver of conditions;

- Not explaining to the client the risks of removing conditions prior to expiry of the development permit notification period, approval of the building permit, and approval of the business license; and
- Advising the client that she could sublease at a higher rent, when that was not possible because the subleasees could see the head lease.

15. The Nature and Gravity of the Proven Allegations

- a) Ms. Simmons's conduct is egregious and requires a significant sanction. Ms. Simmons is an experienced real estate associate and she has taken the Real Estate Update 2014 and 2018 which cover leases and due diligence. She should have known to explain the clauses of the lease to her client, recommend her client to obtain legal advice, and exercise care in preparing documents.
- b) A real estate professional needs to be diligent in carrying out the various functions of their position to prevent clients from experiencing loss. When this does not occur it erodes the trust and confidence placed in the profession by the various stakeholders. In Ms. Simmons' case, the Development Permit that her client sent her clearly noted that it was not valid until after the notification period expired on September 19, 2017, yet Ms. Simmons drafted a waiver of conditions on August 29, 2017. This is a clear failure to provide competent service.
- c) As such, Ms. Simmons' conduct negatively effects trust with clients, which is at the core of the real estate profession. Her conduct is serious in both nature and gravity as it goes to the profession's credibility. Due to her lack of competence, her client suffered great financial loss and was not able to operate her business until more than a year after waiving conditions.

16. The Need to Maintain Public Confidence in the Profession

- a) Real estate associates must practice in strict compliance with the Act and the *Real Estate Act* Rules (the "Rules"), in order to maintain the integrity of the profession. Public confidence in the profession is compromised when an associate refuses to follow the legislation or guidelines and fail to demonstrate competence.
- b) Not only did Ms. Simmons not explain clauses of the lease, she also instructed her conveyancer that no lawyer was required without the consent of her client. Egregiously, the removal of the renewal clause in the signed lease led to the client's lease being terminated with no option for renewal. Her client is also now being sued by her franchisees because of this lack of renewal.

- c) Her conduct undermines the trust the public puts in real estate professionals when they enter into real estate transactions. The education and fines proposed herein are sufficient to maintain public confidence in the Alberta Real Estate profession.

17. The Role of the Member in Acknowledging What Occurred

- a) Ms. Simmons has now taken full responsibility for her actions and shown remorse for what occurred.

18. The Impact of the Incident on the Victims

- a) The complainant is currently involved in civil litigation against Ms. Simmons, and the complainant is also being sued by her own franchisees due to the lease's lack of renewal clause.
- b) The complainant was denied a building permit by the City 3 times and had to do spend more than \$100,000 on renovations to bring the building to code. She did not get City approval on what renovations to do until February 2018, which is six months after she waived conditions. The renovations and business approval completed in October 2018, at which point 14 months had passed from her initial waiver of conditions.
- c) The complainant suffered great financial loss due to not receiving building permit and business license approval more than a year after conditions were removed. During this timeframe, she had to continue paying rent on the property without any income coming in from the property.

19. Specific and General Deterrence

- a) There is a significant need for general deterrence, especially in serious situations where a licensee's lack of competence leads to financial loss. Such lack of competence impacts the public's confidence in the Alberta's real estate profession. Licensees must recognize that harm to public confidence of the Alberta real estate profession comes with sanctions.
- b) Ms. Simmons has a discipline history for not explaining the ramifications of waiving conditions and other sanctionable conduct which necessitates specific deterrence. But, the fact that she has now accepted responsibility for her actions reduces the necessity of specific deterrence.

20. Mitigating Circumstances

- a) Ms. Simmons agreed to an admission deserving of conduct and the herein submissions on sanction, saving the time and cost of proceeding to a hearing.

Previous Sanctions in Similar Circumstances (Precedents)

21. Precedents are not binding on the Hearing Panel but can help the Panel impose sanctions consistently to comparable conduct.
22. We first list some precedents for similar cases with multiple breaches to demonstrate the range for total fines in such cases and then list some precedents for breaches of Rule 41(b), 58(k), and 55(1) respectively. These precedents are instructive in determining the range of fines that should be levied in Ms. Simmons's case.

a) Similar Cases with Breaches of Multiple Rules

23. These precedents indicate a range of fines from \$3,000 to \$15,000 in cases where multiple breaches of similar rules exist.
24. Though there were multiple breaches, Ms. Simmons' has disciplinary history for previous similar conduct, and the complainant faced financial loss, Ms. Simmons has now accepted responsibility for her actions and has expressed remorse. As such, it is proposed that a total fine of \$6,000 be issued in Ms. Simmons' case – near lower the range of fines.
25. In *Johnson* [TAB 2], a real estate associate breached Rule 41(b) like Ms. Simmons, in addition to breaching Rule 41(e) once and Rule 51(1)(d) three times. He was fined \$2,000 for breaching Rule 41(b), \$1,500 for breaching Rule 41(e), and then \$1,000 for each of the three breaches of Rule 51(1)(d), for a total of \$6,500 in fines. Mr. Johnson failed to exercise care in drafting a contract, like Ms. Simmons.
26. In *Shah* [TAB 3], a real estate associate was fined \$2,000 for the breach of Rule 41(b), as well as \$1,500 for breaching Rule 62(1)(a), \$1,500 for breaching Rule 54(3), \$1,500 for breaching Rule 53(c), and \$8,500 for breaching Rule 42(g), for a total of \$15,000 in fines. Mr. Shah, similar to Ms. Simmons, did not include properly drafted terms in an agreement, failed to competently complete a Waiver of Conditions and to specify necessary terms on a purchase contract. Unlike Ms. Simmons, Mr. Shah undermined public confidence by pressuring the complainant to co-sign for a stranger.
27. In *MacLean* [TAB 4], a licensee breached Rule 41(b) twice and breached Rule 42(a) once. He was fined \$5,000 for one breach of Rule 42(a) and \$3,000 for two breaches of Rule 41(b), for a total of \$8,000. Mr. Maclean did not ensure that the tenant initialled all pages of the agreement, left the breach and termination terms blank, and created

two different agreements. Like Ms. Simmons, he did not exercise proper care in drafting documents.

28. In *Clark* [TAB 5], a real estate associate breached Rules 41(b) and Rule 54(2). She was fined \$2,500 for the breach of Rule 41(b) and \$1,500 for Rule 54(2), for a total of \$4,000. Like Ms. Simmons, Ms. Clark failed to advise her client about relevant legal issues and failed to create an amendment to the purchase contract addressing issues from the home inspection. The complainant in *Clark* was unable to live in the property upon taking possession due to mold and asbestos. The complainant had incurred \$9,169.88 in expenses renovating the property. Though Ms. Simmons' conduct created much greater financial loss as her client spent over \$100,000 to bring the property to code and paid rent for over a year with no income coming in from the property, she has now accepted responsibility and expressed remorse.
29. In *Glavonjic* [TAB 6], a real estate associate was fined \$2,000 for a breach of Rule 41(b), \$1,500 for Rule 59, and \$2,000 for Rule 42(a), for a total of \$5,500 in fines. Like Ms. Simmons, Ms. Glavonjic drafted purchase contract conditions in an unclear and ineffective manner. She failed to make continuation of the lease a proper condition of the purchase contract. Similarly, Ms. Simmons failed to advise her client of the removal of the renewal clause in the lease and did not negotiate to have it put back in.
30. In *Kamanzi* [TAB 7], a real estate associate was fined \$2,000 for breaching Rule 41(b), as well as \$1,500 each for Rules 45(3) and 41(d) for a total of \$5,000 in fines. Like Ms. Simmons, Mr. Kamanzi did not advise the complainant to seek legal advice with respect to the mortgage prior to signing a waiver of conditions. Mr. Kamanzi also failed to obtain adequate confirmation that the financing was in order prior to advising the clients to waive their financing condition. Like Ms. Simmons' client, Mr. Kamanzi's clients suffered financial harm.
31. In *Hussain* [TAB 8], a real estate associate was fined \$3,000 for breaching Rules 41(b) and 41(d). He did not explain the risks of entering into an unconditional contract to his clients. Like Mr. Hussain, Ms. Simmons accepted responsibility for her actions.
32. These precedents indicate a range of fines from \$3,000 to \$15,000 in cases where multiple breaches of similar rules exist.
33. Ms. Simmons case is most similar to *Johnson*, *Shah*, and *MacLean*. Like these cases, Ms. Simmons did not exercise care in drafting the lease and waiver of conditions, and her breaches led to financial loss for her client. However, Ms. Simmons' case is less aggravating than *Shah* and *MacLean* because, unlike those licensees, she has accepted full responsibility for her conduct and has also expressed remorse.
34. Though the facts are also similar in *Clark*, *Glavonjic*, *Kamanzi*, and *Hussain*, Ms. Simmons' case is more egregious in nature, given that she has been sanctioned for similar conduct before and given the fact that her client lost over \$100,000. This justifies the total agreed upon fine of \$6,000.
35. As such, the total \$6,000 is a balanced and appropriate sanction for Ms. Simmons' breaches.

b) Breach of Rule 41(b)

36. The precedents indicate a range of fines from \$1,000 to \$3,000 for breaching Rule 41(b).
37. We propose a fine of \$2,500 for Ms. Simmons' breach of Rule 41(b) to be reasonable and to recognize the fact that Ms. Simmons has taken full responsibility for her conduct and expressed genuine remorse.
38. In *Crisostomo* [TAB 9], the licensee agreed to a joint submission of sanction of \$1,000 for his breach of Rule 41(b). Mr. Crisostomo made errors on mortgage applications to various lenders like Ms. Simmons' errors in drafting the lease.
39. In *Faria* [TAB 10], the Appeal Panel confirmed an Administrative Penalty of \$1,500 for breaching Rule 41(b). Mr. Faria inserted a clause into a purchase contract that exposed his client to a risk of losing a landscaping deposit. Mr. Faria also failed to adequately explain to his client the options available to him in placing the deposit into trust. The client ultimately lost a \$2,500 deposit. Like Mr. Faria, Ms. Simmons failed to explain all of the terms of the lease to her client. Also, her waiver of conditions, which did not take timeframes for approvals into account, exposed her client to financial loss.
40. In *Mele* [TAB 11], Mr. Mele received a fine of \$5,000 for breaching Rule 41(b). Mr. Mele inadequately filled out paperwork and had the client sign a notice waiving conditions when it was inappropriate to do so given the timeframes of other approvals. Mr. Mele did not acknowledge any wrongdoing. In contrast, Ms. Simmons has taken full responsibility for her actions and has expressed her remorse.
41. In *Freisz* [TAB 12], a licensee was fined \$4,500 for two breaches of Rule 41(b). Mr. Freisz failed to confirm if there was a legal agreement between the two owners to sell the property. He also failed to indicate an expiry date on a counteroffer. Again, Ms. Simmons has accepted responsibility, unlike Mr. Freisz.
42. In *Gardner* [TAB 13], a licensee was fined \$1,500 for a breach of Rule 41(b). He failed to put a condition date on a counteroffer, similar to Ms. Simmons' errors in waiving conditions.
43. In *Duggal* [TAB 14], a real estate and mortgage associate was fined \$3,000 for a breach of Rule 41(b). In that case, Mr. Duggal did not advise the buyer that the purchase contract for the property was irrevocable and he did not make acceptance of the offer conditional on securing mortgage financing. He also did not obtain written acknowledgement from the buyer that he understood the risk of losing his deposit. Lastly, Mr. Duggal did not try to extend the possession date. Ms. Simmons' breaches are similar, but she has accepted responsibility.
44. In *Hartell* [TAB 15], a real estate associate was fined \$3,000 for a breach of Rule 41(b). Ms. Hartell was unaware whether inspections had been completed and whether

permits had been issued when her clients accepted an offer to purchase the property. She did not advise her clients about these issues, even though the inspections and permits were required to occupy the home. Ms. Simmons similarly did not advise her client of the timeframe for next steps after development permit approval when her prematurely waived conditions. Her client was also not able to occupy the premises.

45. The facts in our case are most similar to *Mele*, *Duggal*, and *Hartell*. Ms. Simmons, like in *Hartell*, did not make herself aware as to whether the property had passed all permit approvals, nor did she inform her client about issues or timeframes of such approvals, upon waiving conditions. Like in *Duggal* and *Mele*, Ms. Simmons failed to inform her client of the risks of prematurely waiving conditions and did not take any steps to obtain an extension of the possession date of the property. However, Ms. Simmons, unlike the licensees in these cases, has expressed genuine remorse, has decided to give up practicing in commercial real estate, and has taken responsibility for her actions, necessitating a lower fine.
46. The conduct in *Cristostomo*, *Faria*, *Freisz*, and *Gardner* was less severe. There was little to no financial harm, fewer number of breaches of Rule 41(b) in each transaction, and no disciplinary history. However, Ms. Simmons has the mitigating factor of her acceptance of wrongdoing.
47. Ms. Simmons has taken responsibility of her conduct. Moreover, she has also decided to stop practicing commercial real estate and expressed genuine remorse. As such, a fine of \$2,500 is proposed for this Rule.

c) Breach of Rule 58(k)

48. There is only one precedent for a breach of Rule 58(k). In *Johanson* [TAB 16], a real estate associate broker was fined \$2,000 for a breach of Rule 58(k). Mr. Johanson did not advise his client to obtain expert advice when he told his client that though the wood stove in the property was not up to code, the client could rely on a remedy clause in the purchase contract. The client removed conditions prior to obtaining a property inspection. Because the wood stove was not up to code, the client was not able to get home insurance and had to spend a lot of money to fix the situation.
49. Ms. Simmons similarly failed to advise her client to obtain legal advice (and also did not advise her to obtain a property inspection) prior to waiving conditions. This led to great financial loss after waiving conditions when her client's building permit application was processing because the property was not up to code for a daycare.
50. As such, a fine of \$2,000 is proposed for Ms. Simmons' breach of this Rule.

d) Breach of Rule 55(1)

51. The precedents indicate a range of fines from \$1,500 to \$5,000 for each breach of Rule 55(1) in similar cases. It is proposed that Ms. Simmons be fined \$1,500 for breaching this rule.
52. In *Holbrook* [TAB 17], a real estate associate breached Rules 42(a), 55(1), and 54(3). He was fined \$3,000 for his breach of Rule 55(1). Like Ms. Simmons, he did not disclose in writing the nature of the services he was providing to his client upon receiving their confidential information.
53. In *Lyons* [TAB 18], a real estate associate was fined \$4,500 for breaching Rule 55(1) by not disclosing the nature of the services he would be providing, pertinent facts, and on whose behalf he was acting. Mr. Lyons had acted for both the buyers and sellers in previous transactions and used information from those previous transactions to negotiate the transaction.
54. In *Kohut* [TAB 19], a real estate associate was fined \$1,500 for breaching Rule 55(1). Ms. Kohut was representing the sellers, who were her mother and step-father, when she was approached by a buyer and entered into a Common Law Transaction Brokerage Agreement to represent both the sellers and buyers. She did not disclose her relationship with the sellers in writing to the buyers.
55. The conduct in *Holbrook* and *Lyons* is more egregious than that of Ms. Simmons as the associates' lack of disclosure in writing in those cases led the clients to being in vulnerable situations and conflicts of interest being hidden. As such, it is proposed that Ms. Simmons be fined the \$1,500 for this Rule.

Sanction

56. Based on precedent and the other *Jaswal* factors it is agreed that an appropriate fines for the breaches are as follows:

Breach	Fine
Rule 41(b) of the <i>Real Estate Act Rules</i>	\$2,500
Rule 58(k) of the <i>Real Estate Act Rules</i>	\$2,000
Rule 55(1) of the <i>Real Estate Act Rules</i>	\$1,500
TOTAL	\$6,000

57. The parties have also agreed that Ms. Simmons will complete Education Upgrade Courses of Consumer Relationships (EDU-001341), Contract Law (EDU-001346), Ethics, Professionalism and Risk Reduction (EDU-001345), and *Real Estate Act, Rules and Regulations* (EDU-001344) within 12 months of the Hearing Panel's decision.

58. The Licensee has agreed to not renew her license in Commercial Real Estate and, as such, is not being ordered to complete upgrade courses in that area.

The Agreement between the Registrar and Licensee

59. An additional factor is that the parties have reached an agreement on conduct and on sanction taking into account the relevant factors.
60. The Supreme Court of Canada addressed the “public interest” test that should be used when considering whether to depart from an agreed outcome in the case *R v. Anthony-Cook* (2016) [TAB 20]:

32 Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.

33 In Druken, at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so “markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system”. And, as stated by the same court in R. v. O. (B.J.), 2010 NLCA 19 (N.L. C.A.) (CanLII), at para. 56, when assessing a joint submission, trial judges should “avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts”.

61. The Court in *Anthony-Cook* also outlines the procedure decision makers must follow if they are inclined to depart from a joint submission (Para 49 – 60).
62. The Registrar and Licensee have considered the factors for an appropriate sanction and submit that this sanction is within an appropriate range that the Panel can accept.
63. Please feel free to express your concerns about the sanction or to ask for further submissions or more information from either party.

All of which is respectfully submitted this _____ day of _____, 2021.

Sincerely,

Sania Chaudhry, Counsel for the Registrar

Melenda Arlene Simmons

Schedule "3"

Case: 004972

Admission of Conduct Deserving of Sanction

1. Melenda Arlene Simmons (hereinafter "Ms. Simmons") admits to the following:

Admitted Facts

2. Ms. Simmons has been licensed as a real estate associate with the Real Estate Council of Alberta ("RECA") since January 8, 2010.
3. At all material times, she was registered with Elite Ownership Group Ltd. o/a Re/Max Elite.
4. [M.A] ("[M.A]") and [V.A] ("[V.A]"), a mortgage associate, had known each other for several years as [V.A] had provided [M.A] his mortgage services when she bought her first home.
5. [M.A] contacted [V.A] when she and [J.S] ("[J.S]") began a relationship and wanted to buy an acreage together after selling [J.S]'s home. [V.A] referred [M.A] and [J.S] to Ms. Simmons.
6. [V.A] and Ms. Simmons were business partners, as they invested in and renovated homes together.
7. [M.A] and [J.S] first contacted Ms. Simmons to act as agent for them in selling [J.S]'s home, which she did in 2013. After selling his home, [J.S] moved into [M.S]'s home.
8. [M.A] and [J.S] then contacted Ms. Simmons in January 2014 to act for them in purchasing an acreage together. Ms. Simmons agreed to do so. [M.A] and [J.S] were both clients of Ms. Simmons from this time.
9. [M.A] and [J.S] informed Ms. Simmons of their budget and preferred type of properties.
10. On receiving this confidential information, Ms. Simmons did not enter into a written service agreement with [M.A] and [J.S].
11. Ms. Simmons began showing [M.A] and [J.S] acreages in and around January 2014.
12. [M.A] and [J.S] believed they would need a 40% down payment to qualify for a mortgage for an acreage, so they did not have the required down payment. They told Ms. Simmons this in or around February 2014. Ms. Simmons then suggested that [M.A] and [J.S] buy a property, renovate it, and then sell the property and use the money from the sale to buy an acreage. Ms. Simmons explained that she renovated homes

with [V.A] as a business venture and began to show [M.A] and [J.S] her renovation properties.

13. Ms. Simmons and [V.A] were renovating a home located at [ADDRESS] (the "[A] Property") since January 2014. [M.A] and [J.S] viewed the [A] Property several times with Ms. Simmons in February 2014.
14. Ms. Simmons proposed that [M.A] and [J.S] use her father's renovation company for their renovation.
15. [M.A] and [J.S] told Ms. Simmons that they wanted to copy Ms. Simmons' business model and renovate a property that was "just like the [A] Property".
16. On or around March 2, 2014, Ms. Simmons prepared a Consumer Relationship Guide. She had only [M.A] sign this document. She did not explain the document to [M.A], which had generic notes about the nature of the relationship and generic information about conflicts of interest.
17. On or around March 3, 2014, [C.S] ("[C.S]"), a real estate associate, listed [ADDRESS] (the "[B] Property") for sale on the Multiple Listing Service ("MLS") for \$344,700. There was only one offer on the property that did not go ahead due to the low price offered. There were not multiple offers.
18. On and around March 6, 2014, Ms. Simmons saw that the [B] Property was for sale on MLS and viewed it herself. Ms. Simmons then phoned [M.A] that same day and advised her that she had seen a property "just like the [A] Property" that had not yet gone on the MLS. Ms. Simmons stated to [M.A] that the [B] Property had great potential to "flip", there were multiple offers already submitted, and they would need to act quickly or possibly lose the home.
19. That same day, [M.A] rushed over from work to Ms. Simmons' Re/Max office and signed an offer without viewing the [B] Property. [J.S] was at work and did not view the [B] Property either. [M.A] felt overwhelmed, rushed, and scared. [M.A] had only purchased one property prior to this, which was the one she was residing in.
20. Ms. Simmons drafted an offer to purchase where [M.A] was the only buyer. On or around March 6, 2014, [M.A] signed this offer for the [B] Property with the following terms:
 - a. Buyer: [M.A];
 - b. Seller: Estate of [G.B.H];
 - c. Purchase price: \$320,000;
 - d. Deposit: \$10,000;
 - e. Balance Owning: \$54,000;
 - f. Down payment: 20%;
 - g. Possession date: March 28, 2014;
 - h. Buyer to accept title insurance and property "as is where is";
 - i. Buyer is to gain access 5 days prior to possession to hook up 100 amp electrical for insurance purposes;

- j. Deceased owner of the property had a non-violent death;
 - k. Conditions: Financing to be satisfied on or before March 12, 2014; and
 - l. All terms on the contract dealing with the Real Property Report were crossed out and initialled.
21. The sellers accepted this offer the next day on March 7, 2014.
 22. On or around March 7, 2014, [M.A] provided a \$10,000 TD bank draft to Ms. Simmons for the deposit which Ms. Simmons forwarded to [C.S]'s office.
 23. This \$10,000 belonged to [M.A] and was not joint property with [J.S]. It remained held in trust with the sellers' agent from this point forward.
 24. [M.A] instructed [V.A] to make applications for mortgages. [V.A] submitted three mortgage applications for [M.A] on March 10, 11, and 12, 2014.
 25. [M.A] was denied financing on all three applications by March 12, 2014. [V.A] did not tell [M.A] and [J.S] about these mortgage refusals. [V.A] told Ms. Simmons on March 12, 2014 that [M.A] was not getting approved for mortgages due to "a high debt ratio". Ms. Simmons did not disclose this to [M.A] and [J.S] either.
 26. On or around March 12, 2014, Ms. Simmons drafted a Residential Purchase Agreement Addendum removing [M.A] as the purchaser and inserting [J.S] as the purchaser instead. [M.A] and [J.S] both signed this Addendum. Ms. Simmons told [M.A] and [J.S] that they had to do this because [J.S] did not have a home in his name since his had sold, so this way they would not have to pay capital gains tax. These were accepted by the seller.
 27. On or around March 12, 2014, Ms. Simmons drafted a Residential Purchase Agreement Amendment changing the deadline for financing from March 12, 2014 to March 14, 2014. She only had [M.A] sign this Amendment, not [J.S]. These were accepted by the seller.
 28. On instructions from [J.S], [V.A] submitted a mortgage application for [J.S] on March 12, 2014.
 29. On or around March 13, 2014, Ms. Simmons drafted a Residential Purchase Agreement. This contract listed [J.S] as the buyer for the [B] Property with a possession date of April 4, 2014. All other terms of the contract were the same as the initial Residential Purchase Contract signed by [M.A] on March 6, 2014.
 30. The sellers accepted this second agreement the next day on March 14, 2014 and Ms. Simmons sent this to [V.A].
 31. [J.S] was approved for a mortgage on March 14, 2014.
 32. On or around March 14, 2014, Ms. Simmons drafted a Residential Purchase Agreement Notice stating that the financing condition is approved and satisfied, and the home is now sold. [J.S] signed this the same day.

33. On or around March 14, 2014, [J.S] signed a Consumer Relationship Guide with Ms. Simmons. Ms. Simmons did not explain this document to [J.S]. Ms. Simmons did not obtain a service agreement with either [M.A] and [J.S] when the relationship began.
34. Ms. Simmons instructed [C.S] on March 14, 2014 to transfer the \$10,000 deposit provided by [M.A] and [J.S]'s purchase contract because [M.A] and [J.S] were in a relationship. Ms. Simmons never received any instructions or consent from [M.A] to transfer the deposit over.
35. [J.S] obtained possession of the [B] Property on March 28, 2014.
36. [J.S] retained Ms. Simmons' father's company to renovate the property.
37. [M.A] and [J.S] later ended their relationship.
38. The \$10,000 deposit was released to the owner as part of the purchase price and [M.A] never received her \$10,000 back and had no equity in the property.

Admitted Breaches

39. It is admitted that the below conduct is deserving of sanction for the following breaches:
 - a. Ms. Simmons made representations that were reckless or intentional in her communications with Ames that misled Ames or was likely to mislead [M.A], contrary to s. 42(a) of the *Real Estate Act Rules*:
 - i. Ms. Simmons told [M.A] that the [B] Property had "multiple offers", was not yet listed on MLS, and they would need to act quickly or possibly lose the home.
 - ii. This was not true.
 - iii. Ms. Simmons made representations about the reason for changing the purchaser on the purchase agreement as being for tax reasons. The real reason was that [M.A] could not obtain a mortgage.
 - b. Ms. Simmons failed to act competently in representing [M.A] and [J.S], contrary to s. 41(b) of the *Real Estate Act Rules*:
 - i. When Ms. Simmons agreed in January 2014 to act as agent on behalf of her brokerage for [M.A] and [J.S], she did not ask for instructions on who the buyer would be (whether it would be [M.A] OR [J.S] or both) or determine ability to obtain a mortgage of both or either.
 - ii. Ms. Simmons failed to tell [M.A] and [J.S] about the mortgage application refusals.

- iii. Ms. Simmons advised [M.A] and [J.S] about capital gains tax issues when she was not qualified to do so.
- c. Ms. Simmons failed to fulfil her fiduciary obligations to [M.A] and [J.S], contrary to s. 41(d) of the *Real Estate Act Rules*:
 - i. Ms. Simmons instructed [C.S] to apply the \$10,000 deposit [M.A] paid to [J.S]'s purchase of the property on March 14, 2014 without instructions from [M.A].
- d. Ms. Simmons failed to disclose to [M.A] that Simmons was in a conflict of interest contrary to s.41(f) of the *Real Estate Act Rules*
 - i. Ms. Simmons was agent for both [M.A] and [J.S] as buyer clients.
 - ii. Ms. Simmons failed to tell [M.A] that Ms. Simmons was in a conflict of interest acting for both [M.A] and [J.S] when she proposed to make [J.S] the only buyer but use the \$10,000 owned by [M.A] as equity in the purchase. Her conflict was that it was in [M.A] best interest not to pay the money to [J.S] and it was in [J.S]'s best interest to obtain title and the \$10,000 exclusively in his name.
- e. Ms. Simmons did not enter into a written service agreement with [M.A] and [J.S], contrary to s. 43(1) of the *Real Estate Act Rules*.

Admitted Factors on Sanction

- 40. It is admitted that the following facts are relevant as mitigating factors:
 - a. Ms. Simmons has agreed to forego the time and expense of a hearing, saving witnesses the inconvenience and stress of appearing, by entering into the within Consent Agreement; and
 - b. Ms. Simmons has experienced remorse for the conduct in question.
- 41. It is agreed that the following facts are relevant as aggravating factors:
 - c. Ms. Simmons has prior discipline:
 - i. Administrative Penalty in December 2014 for breach of Rules 41(e) and 42(a) by misrepresenting a Consumer Relationship Guide to her broker and RECA and failing to make her role understood to her clients;
 - ii. Letter of Reprimand in September 2016 for breach of Rule 42(a) by misrepresenting the registered size of a condominium; and
 - iii. Ms. Simmons was issued a Letter of Reprimand in April 2019 when she failed to notify RECA when a judgment was rendered against her, thereby breaching Rule 40(1)(c);
 - d. An advisory note is not discipline but is information for the licensee about their practice. Ms. Simmons was issued an advisory note in July 2012 about Rule 41(b) where she did not explain the ramifications of waiving financing conditions when she had the clients sign their purchase agreement; and
 - e. Ms. Simmons is an experienced real estate associate.

Schedule "4"

Case: 008729

Admission of Conduct Deserving of Sanction

1. Melenda Arlene Simmons (hereinafter "Ms. Simmons") admits to the following:

Admitted Facts

2. Ms. Simmons has been licensed as a real estate associate with the Real Estate Council of Alberta ("RECA") since January 8, 2010.
3. At all material times, she was registered with Elite Ownership Group Ltd. o/a Re/Max Elite.
4. Ms. Simmons took the Real Estate Update course in 2014, Unit 1 of which explains due diligence and fiduciary obligations owed to clients. This unit instructs real estate associates to exercise due diligence, be aware of market/practice issues, make reasonable efforts to confirm information, exercise due care in preparing documents, and seek advice when appropriate.
5. This Update further recommends the real estate associates attend their clients' meeting with legal counsel to hear what legal advice is given.
6. In 2015, Ms. Simmons acted for [C.Y] ("[C.Y]") when [C.Y] wanted to lease a property for a daycare. [C.Y] found her own property and established her daycare. In that lease, the landlord looked after all permits and building improvements.
7. In 2017, [C.Y] asked Ms. Simmons to look for another suitable property to lease. [C.Y] advised Ms. Simmons that she intended to open a second daycare, which she would sublet to a franchisee and charge rent greater than the head lease. [C.Y] envisioned opening a series of franchise daycares.
8. On receiving this confidential information, Ms. Simmons did not inform [C.Y] in writing of the nature of services Ms. Simmons would provide.
9. Ms. Simmons told [C.Y] to find out from the City what zoning was required for a daycare.
10. In June 2017, Ms. Simmons told [C.Y] she found a house, located at [ADDRESS] (the "Property") which had been a daycare in the 1990's.
11. Ms. Simmons told [C.Y] the listing agent said the Property had been a daycare in the past. [C.Y] saw the square footage and assumed it could hold 60 children.

12. The City of Edmonton informed [C.Y] that the Property was zoned for "Discretionary Use" and that zoning includes daycares. [C.Y] then viewed the Property with Ms. Simmons and told Ms. Simmons she would like to try to lease it.
13. Ms. Simmons emailed the listing agent, Parsons, on June 5, 2017 and asked questions about the Property's size, heating, plumbing, age, garage, windows, fireplace, Real Property Report ("RPR"), and interest in lease to own. She did not ask about any specific daycare requirements. Parsons responded the next day responding to these questions.
14. Ms. Simmons did not ask [C.Y] if she wanted to hire a property inspector. There was no property inspection done.
15. On or around June 13, 2017, Ms. Simmons wrote a Commercial Buyer Brokerage Agreement (Exclusive) between [L.LD] ([C.Y]'s company) and Re/Max Elite. [C.Y] signed this Agreement creating an exclusive buyer agency relationship between [C.Y]'s business and the brokerage. It commenced June 13, 2017 and expired June 30, 2018.
16. On or around June 13, 2017, Ms. Simmons also wrote a Commercial Agreement to Lease (the Offer). She wrote the tenant as "[L.L.D] c/o [C.Y]" and left the Landlord information blank. The terms she wrote were as follows:
 - a. The term of the lease to be for 5 years from October 1, 2017 to October 31, 2022;
 - b. Deposit of \$10,000;
 - c. Tenant Inducements: "3 months for tenant improvements, free rent, plus month 36 and 47 will be free rent";
 - d. Tenant agrees to accept the Property in an "as is" condition;
 - e. Parking lot included;
 - f. Use of Property: "Daycare and Preschool Operation";
 - g. Tenant's Subject Conditions: "City approval for permits for Business Operation, Development permit, and other operational requirements", as well a satisfactory real property report and confirmation of measurements in a drawing of each room before September 15, 2017;
 - h. Additional Terms: "[L.L.D] will have the 1st opportunity to purchase property within the 1st 5 years at market value which will be based on two appraisers who are qualified in the province of Alberta"; and
 - i. A renewal clause to allow a further year of renewal within 6 months prior to the end of the term.
17. [C.Y] signed the Offer on June 13, 2017 and Ms. Simmons sent it to Parsons.
18. On June 21, 2017, Parsons sent an email to Ms. Simmons with a Counter Offer from the landlord with the following changes:
 - a. The free rent was reduced to three months: September, October, and November 2017;
 - b. The renewal clause and RPR and property drawing clauses were deleted;
 - c. The deposit was increased to \$13,461;

- d. The tenant conditions were rewritten as “the tenant obtain necessary zoning and development approvals required to occupy the premises from the appropriate government authority by August 15, 2017”; and
 - e. The phrase “all other operational requirements” was deleted.
- 19. Ms. Simmons replied by email to Parsons on June 21, 2017 asking for a drawing of the property for the permit application and the RPR for fencing. She also asked to move the tenant condition date to October 1, 2017 to accommodate permits approvals. Ms. Simmons did not know how long permit approvals would take and did not tell [C.Y] she did not know this.
- 20. The next day, Parsons replied that the landlord was obtaining the RPR and drawings and would agree to the later tenant condition date. Ms. Simmons forwarded this email to [C.Y] with no explanation. [C.Y] replied that this is all “reasonable”. Ms. Simmons replied that she agrees. [C.Y] and Ms. Simmons discussed the Offer over the phone. Ms. Simmons said it was “a good offer” and it was “standard”. She asked [C.Y] to let her know when she was ready to sign it.
- 21. Ms. Simmons did not discuss each change in the Counter Offer or explain what it might mean, in particular the removal of “all other operational requirements” or the removal of the renewal clause. [C.Y] did not notice these changes and did not understand what “all other operational requirements” meant.
- 22. Ms. Simmons was not an expert in development and building permit procedures or what change of use or an older property may entail in that process. She was also not an expert in subletting and franchising. Despite this, she did not advise [C.Y] to seek legal advice on the lease or her plan to franchise and sublet before signing the Counter Offer.
- 23. [C.Y] signed the Counter Offer on June 26, 2017 and added in a clause to the tenant’s subject conditions regarding financial approval for business development. The same day, Ms. Simmons emailed [C.Y] floor plans for the Property.
- 24. One June 27, 2017, the landlord signed the Counter Offer.
- 25. In the signed agreement [C.Y] was responsible for “all other work necessary to complete the Premises” and all the permits. The landlord had to give final approval on “all improvements ... not to be unreasonable [sic] withheld.”
- 26. On or about July 1, 2017, [C.Y] provided a deposit of \$13,461, held at Parsons’ office.
- 27. On or about July 20, 2017, [C.Y] applied for the “Major Development Permit” and Building Permit.
- 28. On August 10, 2017, Ms. Simmons sent an email to [C.Y] asking for an update on the lease and development permits. The next day, [C.Y] replied she was speaking with the development officer and an extension of the condition date was required.

29. On August 15, 2017, Parsons sent a "Notice RE: Satisfaction or Waiver of Condition Precedent and Addendum Form" to Ms. Simmons. This document did the following:
 - a. Removed the financial approval condition;
 - b. Extended the condition to obtain necessary zoning and development approvals to September 1, 2017; and
 - c. Changed the Lease Commencement Date to September 15, 2017.
30. [C.Y] signed the "Notice RE: Satisfaction or Waiver of Condition Precedent and Addendum Form" on August 15, 2017 and the landlord signed it on August 16, 2017.
31. On August 29, 2017, the City of Edmonton emailed [C.Y] stating it had approved the Major Development Permit with notices, with the approved permit attached. The scope of the permit was to change the use of the Property from professional financial services to childcare services. The Development Permit document attached to the email stated that the permit is not valid until the required notification period expires on September 19, 2017.
32. The Development Permit also stated that a building permit is separately required and that this Development Permit was not a Business License. The email from the City attaching the Development Permit stated that the Development Office would hold the application until the public notice period had cleared on September 19, 2017, but there was the option to sign the Development Permit Waiver form to initiate the Building Permit process before the notification period ended.
33. That same day, [C.Y] sent an email to Ms. Simmons stating: "Development permit approved!! I am applying for the notification waiver to get the building permit immediately. Please let me know the earliest we can take possession and start renovations!!!".
34. Ms. Simmons, also that same day, forwarded to [C.Y] an email from Parsons, which stated that the landlord is attempting to get out earlier than the possession date of September 15, 2017 and that the landlord will not be proceeding with a formal lease but has agreed to accept the signed Counter Offer as the official formal lease. In this email, Ms. Simmons stated "that's what I got". To that email, [C.Y] simply replied "Sweet!!!! Done and done!".
35. [C.Y] and Ms. Simmons then had a phone conversation in which Ms. Simmons asked if [C.Y] was prepared to remove the last remaining condition of zoning and development approvals because of this news. [C.Y] said yes.
36. At this time, [C.Y] was unaware of what was required to obtain the building permit and how much work would be required to change the use of the older property and bring it to current code.
37. Ms. Simmons did not advise [C.Y] that:
 - a. Waiving the condition put her at risk. The condition allowed her to nullify the agreement if the cost of required improvements was more than she could afford. On waiving it, she was bound in the lease even if she did not obtain all permits and approvals;

- b. The Major Development Permit was not granted until the Public Notice period ended on September 19, 2017 without objection;
 - c. The Building Permit was not yet approved. [C.Y] did not know what the City would require her to do before opening the daycare;
 - d. Without Building Permit approval, [C.Y] could not know if the landlord would approve work required by the City;
 - e. [C.Y] should extend the condition period until she had more information from the City about the building permit requirements; and
 - f. [C.Y] should consider getting legal advice about the permit process and whether she could sublet the property to a franchisee for higher rent than what was on the head lease.
38. [C.Y] did not know or understand the potential risks of waiving the final permit condition.
 39. On August 29, 2017, Ms. Simmons drafted a Commercial Purchase Contract Notice stating that the tenant's subject conditions have now been satisfied as of August 29, 2017 and had [C.Y] sign it.
 40. On August 31, 2017, Re/Max Elite sent a letter to Parsons requesting commission of \$8,064.
 41. [C.Y] took possession of the Property on September 12, 2017.
 42. On October 16, 2017, [C.Y] received an email from the City of Edmonton that it had now assigned her building permit application to a plans examiner. The next day, [C.Y] sent an email to the plans examiner about her "desperate need for a review/approval to begin renovations" as she had been paying base rent on the Property since September and the full rent was due January 1st. The plans examiner replied the same day that he would review this as a priority.
 43. On October 18, 2017, the plans examiner sent [C.Y] an email stating that he reviewed the plans submitted with the building permit application, there are some large obstacles to overcome before he can issue a building permit, and the potential costs of doing this could make the project unrealistic.
 44. The next day, [C.Y] replied to the plans examiner that her contractor had walked through the property and had suggested that he replace certain areas of drywall to satisfy fire ratings.
 45. That same day, the plans examiner replied and listed several additional things [C.Y] would have to do to bring the building to code. He advised the building in its current state is a poor choice for a lease opportunity. He advised that an architect will be required to review and design plans for the Property and the plans examiner cannot continue with his plans review without receiving these plans.
 46. That same day, [C.Y] forwarded this correspondence to Ms. Simmons and the landlord stating that she is not sure what to do as she is not able to obtain a building permit for a daycare without major renovations which she is not financially able to do.

47. On October 24, 2017, [C.Y] sent Ms. Simmons an email with information to advertise the space as a sublease.
48. On November 1, 2017, [C.Y] sent an email to the landlord asking for permission to do all necessary renovations so that she can get a permit, noting that she needs to do this to be able to honour the lease and asking to terminate the lease if he does not approve of the changes. [C.Y], Ms. Simmons, Parsons, and the landlord corresponded back and forth over email as the landlord was initially not amenable to changes nor was he amenable to termination of the lease.
49. Among these emails, Ms. Simmons sent an email on November 1, 2017 to Parsons explaining that [C.Y] is doing everything she can to work with the landlord, the landlord knew this would be a daycare, and the landlord cannot now change his mind by not approving what is required by the City. Parsons replied that it was clear in the signed Counter Offer that the premises was to be accepted in an "as is" condition and noted that any additional items should have been included in the Counter Offer or added as an amendment before conditions were removed. He then concluded by stating that due diligence and permit approval was not the landlord's responsibility, it was that of the tenant.
50. On November 2, 2017, [C.Y] replied to Parsons, with Ms. Simmons copied, with a list of minimum changes. On November 4, 2017, [C.Y] sent an email to Parsons, with Ms. Simmons copied, stating that she met with the contractor and architect and is facing over \$100,000 in renovation costs to bring the building up to code for her daycare. She then listed all the renovations needed.
51. The City denied [C.Y] a building permit three times and she had to do spend more than \$100,000 on renovations to bring the building to code. She had to let go of her first contractor and then her second contractor did not get City approval on what renovations to do until February 2018 when the landlord had finally agreed to the changes.
52. In March 2018, the landlord decided to go forward with a formal lease which [C.Y] had to personally guarantee.
53. On March 1, 2018, the Province of Alberta received [C.Y]'s application for her daycare license. On March 2, 2018, [C.Y] received a letter from the Province of Alberta stating that her application for [L.L.D] was incomplete and they needed evidence of the Property being in compliance with zoning, health, and safety legislation and child case subsidy grant agreement.
54. [C.Y] consulted a lawyer in March 2018 when the landlord wanted to sign a formal lease. The lawyer advised [C.Y] she could not charge a higher rent to a franchisee because the tenant could see the head lease and would likely refuse to pay more.

55. The Property finally passed City inspection on August 2018 and the Province provided health and licensing approvals for the daycare in September 2018. [C.Y] opened her daycare on October 1, 2018.
56. [C.Y] could only have 40 children because the basement and third floor were not being appropriate for a daycare.
57. In November 2018, the owner of the lot neighbouring the Property purchased the Property from the landlord.
58. Due to the lack of renewal clause, [C.Y]'s new landlord gave notice that they will not renew the lease at the end of the four years.
59. [C.Y]'s franchisees sued her to get out of their franchise agreement due to the above issues.
60. [C.Y] sued Ms. Simmons for the damages she has suffered.
61. Both suits are ongoing.

Admitted Breaches

62. It is admitted that the below conduct is deserving of sanction for the following breaches:
 - a. Ms. Simmons failed to provide competent service to her client, contrary to s. 41(b) of the *Real Estate Act Rules*:
 - i. Ms. Simmons failed to perform any due diligence on the suitability of the Property for [C.Y]'s purpose and on the permit approval process before advising [C.Y] on the merits of the property;
 - ii. Ms. Simmons advised [C.Y] that she could sublease at a higher rent, when that was unlikely to succeed because the subleasees could see the head lease rent amount;
 - iii. Ms. Simmons did not advise [C.Y] to have a formal property inspection of the Property performed; and
 - iv. Ms. Simmons did not recommend [C.Y] wait to waive the tenant condition given that she had not yet received the finalized Development Permit, nor had she received Building Permit approval.
 - b. Ms. Simmons failed to advise the buyer to obtain expert advice on matters of importance to the buyer, contrary to s. 58(k) of the *Real Estate Act Rules*:

- i. Ms. Simmons was not an expert in the permit process or subletting and could not fully advise [C.Y] on these subjects, which were important matters in the transaction; and
- ii. Ms. Simmons did not advise [C.Y] to obtain legal advice about the permit process and her plan to sublet to a franchisee before signing the lease and before waiving the tenant condition;
- c. Ms. Simmons did not disclose in writing to [C.Y] the nature of her services, any conflicts of interest, nor any other facts that could influence their decision upon receiving confidential information from her on the types of properties she was looking for, contrary to s. 55(1) of the *Real Estate Act Rules*.

Admitted Factors on Sanction

63. It is admitted that the following facts are relevant as mitigating factors:

- a. Ms. Simmons has agreed to forego the time and expense of a hearing, saving witnesses the inconvenience and stress of appearing, by entering into the within Consent Agreement; and
- b. Ms. Simmons has expressed remorse for the conduct in question.

64. It is admitted that the following facts are relevant as aggravating factors:

- a. Ms. Simmons has prior discipline:
 - i. Administrative Penalty in December 2014 for breach of Rules 41(e) and 42(a) by misrepresenting a Consumer Relationship Guide to her broker and RECA and failing to make her role understood to her clients;
 - ii. Letter of Reprimand in September 2016 for breach of Rule 42(a) by misrepresenting the registered size of a condominium; and
 - iii. Ms. Simmons was issued a Letter of Reprimand in April 2019 when she failed to notify RECA when a judgment was rendered against her, thereby breaching Rule 40(1)(c);
- b. An advisory note is not discipline but is information for the licensee about their practice. Ms. Simmons was issued an advisory note in July 2012 about Rule 41(b) where she did not explain the ramifications of waiving financing conditions when she had the clients sign their purchase agreement; and
- c. Ms. Simmons is an experienced real estate associate.